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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOHN FRANKLIN GOODNER, Defendant and Appellant.	A153100 (Contra Costa County Super. Ct. No. 5-151099-9)

INTRODUCTION

A jury convicted defendant John Franklin Goodner of one count each of attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a)),[1] assault with a firearm (§ 245, subd. (a)(2)), shooting at an inhabited dwelling (§ 246), making criminal threats (§ 422), and stalking (§ 646.9, subd. (a)). As to the attempted murder count, the jury found defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) and as to the assault count, the jury found defendant personally used a firearm (§ 12022.5, subd. (a)). On appeal, defendant contends (1) reversal is required because in his closing argument the prosecutor committed *Griffin*[2] error by implicitly referring to defendant's failure to testify; and (2) the case should be remanded to allow the trial court to exercise its discretion as to whether to strike the firearm enhancement pursuant to Senate Bill No. 620 (2017–2018 Reg. Sess.). The Attorney General agrees Senate Bill No. 620

[1] All further statutory references are to the Penal Code.

[2] *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

(2017–2018 Reg. Sess.) applies retroactively and that the matter should be remanded. We affirm the judgment, but remand for the trial court to consider resentencing under amended section 12022.53, subdivision (h).

BACKGROUND

Given the issues on appeal, we need only summarize the underlying facts. Defendant and Cynthia S. married in 2010 and separated in 2014. After their separation, defendant engaged in a course of escalating harassment, including showing up uninvited and unannounced at Cynthia's home and places she happened to be, placing a tracking device on her car, and threating to "kill" her. Cynthia obtained a restraining order against defendant in late January 2015. On the same day Cynthia obtained the order, defendant texted her referencing the order, even though she had not informed him about the order or served him with a copy.

Two days later, Cynthia was awakened around 2:00 a.m. by five gunshots fired into her bedroom. She immediately called the police. While speaking with one of the responding officers minutes after the incident occurred, Cynthia received a phone call from defendant, which she did not answer.

Officers immediately went to defendant's home, and on arrival about 10 minutes after the shooting, saw defendant's truck parked in the driveway. The hood was warm to the touch. One officer saw a gun and ammunition inside the truck and collected them. After a 35-minute standoff, defendant was arrested.

Defendant was charged with attempted premeditated murder with an allegation of personal intentional discharge of a firearm (§§ 664, subd (a), 187, subd. (a) & 12022.53, subd. (c)), assault with a firearm with an allegation of personal use of a firearm (§§ 245, subd. (a)(2) & 12022.5, subd. (a)), shooting at an inhabited dwelling (§ 246), making criminal threats (§ 422), and stalking (§ 646.9, subd. (a)).

At trial, the jury heard from several witnesses, including a witness at the scene who saw defendant's truck outside Cynthia's home the night of the shooting. The jury also watched surveillance footage of defendant's truck driving by Cynthia's house at the

time of shooting. There were flashes of light from the truck consistent with shots being fired.[3]

The jury returned a guilty verdict on the count of attempted murder (but not premeditated) and on the rest of the counts as charged and found true the firearm enhancements. Defendant was sentenced to 28 years four months in prison, which included a 20-year term for the firearm enhancement on the attempted murder conviction (§ 12022.53, subd. (c)).

DISCUSSION

Griffin *error*

Following the prosecutor's closing argument, defendant moved for a mistrial based on comments by the prosecutor that defendant claimed improperly referenced his decision not to testify. (See *Griffin, supra*, 380 U.S. 609.) After hearing from both the prosecutor and defense counsel, the trial court denied the motion. Defendant maintains the prosecutor committed *Griffin* error and the court erred in denying a mistrial.

"[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (*Griffin, supra*, 380 U.S. at p. 615.) *Griffin* error is committed "whenever the prosecutor or the court comments upon defendant's failure to testify." (*People v. Vargas* (1973) 9 Cal.3d 470, 475 (*Vargas*).) The prosecutor may not refer to the absence of evidence that only the defendant's testimony could provide. (*People v. Brady* (2010) 50 Cal.4th 547, 566 (*Brady*).) However, the *Griffin* rule " 'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.' " (*Vargas*, at p. 475.)

Defendant first complains about comments by the prosecutor that defendant became aware of the restraining order before Cynthia told him about it or served

[3] In addition, ammunition found in defendant's car was consistent with casings recovered at defendant's home and bullets recovered at the crime scene.

him with a copy. The prosecutor argued: "Now, the defendant's reaction. This is important, ladies and gentlemen. I put two text messages up here because these two are very relevant. The defendant was well aware of this restraining order. The defendant text messaged [Cynthia] within hours of actually getting the restraining order, and he pled with her to get out of it. He said they could get a divorce. They could do things to get away from it. You don't need to get a restraining order. The question, ladies and gentlemen, is how did the defendant know she got the restraining order to begin with? *No one has told you that*." (Italics added).

Defendant maintains the statement " '[n]o one has told you that' " was an indirect comment on defendant's failure to testify regarding his knowledge of how he learned about the restraining order. Defendant relies on *People v. Williams* (1971) 22 Cal.App.3d 34, 43 (*Williams*), in which the Court of Appeal concluded the prosecutor violated *Griffin* by arguing " 'no one has chosen to tell us what the motive was' " for the crime, when it was clear that " 'no one' " referred to the defendant himself. (Italics omitted.) However, there was additional context in *Williams* that rendered the prosecutor's comment improper. During opening statement, the prosecutor had said: " 'It is possible *there is one person and only one person that knows why* [*the victim*] *was killed, and I suggest to you that is . . . Williams* [*defendant*].' " (*Ibid.*) And in closing argument, the prosecutor additionally asserted that while motive was of benefit in some cases, " 'It's of no benefit in this particular case because *no one* has chosen to tell us what the motive was.' " (*Ibid.*) As the appellate court observed, it was "clear that [the prosecutor] was speaking of defendant himself, particularly in light of his remark . . . that there was only one person who knew why [the victim] was killed and that was defendant." (*Ibid.*)

That is not the situation here. Rather, the prosecutor's argument was a permissible comment on the state of the evidence. Cynthia testified, for example, that court documents were viewable online. But the defendant presented no evidence regarding his search history. (*People v. Brown* (2003) 31 Cal.4th 518, 554 [*Griffin* does not preclude the prosecutor from commenting on the failure of the defense to introduce material

evidence or call logical witnesses]; *People v. Hughes* (2002) 27 Cal.4th 287, 373 (*Hughes*) [prosecutor's comments that " '[t]he defense has called no witness[es]' " and " 'there has been no evidence' " were comments on the general state of the evidence rather than an assertion the prosecution's evidence was not contradicted by defendant personally].)

Defendant next complains about comments by the prosecutor on the defendant's phone call to Cynthia just after the shooting. The prosecutor argued: "The defendant called [Cynthia] during this standoff. *There was no challenge to that.* Why is he calling [Cynthia] at 2:30 in the morning, after her house is shot up? *There is no explanation for that, because there couldn't possibly be an explanation*." (Italics added.)

Defendant contends the statements " '[t]here was no challenge' " and " '[t]here is no explanation' " as to why the defendant called at 2:30 in the morning are *Griffin* error because defendant is the only one who could have provided an explanation.

These statements were, again, permissible comments on the state of the evidence, rather than assertions the evidence had not been contradicted by the defendant personally. (See *Hughes, supra*, 27 Cal.4th at p. 373.) The defense could have introduced other evidence to refute the prosecution's evidence that defendant had placed the call. For example, cell phone records could have demonstrated the call was not placed at the relevant time—if that were true—or that 2:30 a.m. phone calls by defendant were not out of the ordinary—if that were true. In short, the prosecutor's comment that "[t]here was no challenge" to the evidence of his post shooting phone call to Cynthia was not a veiled comment on defendant's exercise of his constitutional right not to testify. The prosecutor's comment that "[t]here is no explanation [for defendant's calling immediately after the shooting] . . . because there couldn't possibly be an explanation" is, similarly, editorial commentary. It cannot reasonably be characterized as an improper reference to defendant's decision not to testify.

In any case, even if the prosecutor's challenged comments constituted *Griffin* error, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

Following the defendant's objections to the prosecutor's argument, the trial court stated "any potential that the jury might take [the first statement] to mean a comment on the defendant's not testifying as to how he knew there was a restraining order" could be addressed through an instruction. Accordingly, before argument resumed, the court instructed the jury that the right to remain silent is "an absolute constitutional right and [the jury] cannot consider the fact that the defendant did not testify for any purpose." The court subsequently instructed the jury pursuant to CALCRIM No. 355, which is entitled "Defendant's Right Not To Testify" and emphasizes jurors must not consider the fact the defendant did not testify "for any reason at all" and that it must not "influence your decision in any way." "We assume the jury followed these instructions, and that any prejudice . . . was thus avoided." (*People v. Chatman* (2006) 38 Cal.4th 344, 405; see *Vargas, supra*, 9 Cal.3d at pp. 476, 479 [no prejudice where prosecutor's remark " 'there is no denial at all' " defendants were at the crime scene was "brief and mild" and the "trial court . . . admonished the jury and carefully explained to them that no adverse inferences were to be drawn from defendant's silence"].)

The evidence against defendant was also overwhelming. Numerous witnesses testified defendant was stalking Cynthia, surveillance footage showed defendant's truck driving by Cynthia's house at the time of the shooting and flashes of light consistent with gunshots being fired, witnesses reported seeing defendant's truck driving away from the scene just after the shooting, the hood of defendant's truck was warm to the touch shortly after the shooting, and ballistics matched the ammunition recovered from defendant's truck to one of defendant's guns and the ammunition casings recovered at the crime scene. Given this record, the "brief and mild" comments by the prosecutor were unquestionably nonprejudicial. (See *Brady*, 50 Cal.4th at p. 566; *Vargas*, *supra*, 9 Cal.3d at p. 481.)

In *Williams*, on which defendant relies, the Court of Appeal concluded *Griffin* error was prejudicial given the "totality of error," including erroneous jury instructions. (*Williams, supra*, 22 Cal.App.3d at pp. 40, 45, 58.) Here, there was no such

accumulation of error. Defendant's reliance on *People v. Hill* (1998) 17 Cal.4th 800[4] is similarly misplaced. While the Supreme Court observed in *Hill* that a prosecutor's comments during closing argument may be " ' "worthless as a matter of law" ' " but " ' " 'dynamite to the jury,' " ' " the high court was addressing prosecutorial reference to *facts* not in evidence. (*Id*. at pp. 827–828.) Here, the prosecutor was focusing on the evidence *in* the record, and, as we have explained, appropriately commenting that much of it was uncontradicted.

In sum, the prosecutor did not commit *Griffin* error, and even if error occurred, it was harmless under *Chapman*.

Senate Bill No. 620 (2017–2018 Reg. Sess.)

Effective January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) amended subdivision (h) of section 12022.53 to add the following language: "(h) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h); Sen. Bill No. 620 (2017–2018 Reg. Sess.) § 2.)

The Attorney General acknowledges Senate Bill No. 620 (2017–2018 Reg. Sess.) applies to defendant. He further acknowledges the matter should be remanded to allow the trial court to consider whether to strike or dismiss the gun enhancement, since the record does not demonstrate the court would have refused to do so had it had such discretion at the time of sentencing.

DISPOSITION

The judgment of conviction is affirmed. The matter, however, is remanded for the trial court to consider resentencing under section 12022.53, subdivision (h).

[4] Overruled on other grounds, as stated in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1065, fn. 13.

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Banke, J.

We concur:

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Margulies, Acting P.J.

_____
Sanchez, J.

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